2007

The State of Utah v. Daniel Lee Keener : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,	:	
Plaintiff/Appellee	:	
v.	:	
DANIEL LEE KEENER	:	Case No. 20070485-CA
Defendant/Appellant	:	

APPELLANT'S REPLY BRIEF

Appeal from a judgment of conviction for one count of Unlawful Possession of a Controlled Substance with Intent to Distribute, a third degree felony, in violation of Utah Code Ann. § 58-37-8(1)(a)(iii) (2002); and one count of Endangerment of a Child or Elder Adult, a third degree felony, in violation of Utah Code Ann. § 76-5-112.5 (2003), in the Third Judicial District, in and for Salt Lake County, State of Utah, the Honorable Judith S. Atherton, presiding.

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ARGUMENT

POINT. SUPPRESSION IS REQUIRED UNDER BOTH THE FEDERAL AND STATE CONSTITUTION WHERE THE OFFICER INTENTIONALLY OR RECKLESSLY PROVIDED OR OMITTED MATERIAL INFORMATION IN THE AFFIDAVIT TO ESTABLISH PROBABLE CAUSE.

The intentional or reckless characterization of Mr. Lambson as a "concerned citizen," rather than an individual detained by officers for possession of a stolen ring, materially affected the affidavit. This misleading characterization denied the magistrate the ability to properly evaluate the sufficiency of the relevant factors under the totality of the circumstances in determining whether probable cause existed. An evaluation of the factors demonstrates that the affidavit was insufficient to support a finding of probable cause based on an informant who, after he was caught and detained by police for attempting to sell a stolen ring, shifted the blame to other individuals who he purported sold him the ring and possessed drugs. Furthermore, the omission of the informant's criminal history which includes a charge of a crime of dishonesty along with the

complete absence of any corroboration negates a finding of probable cause. Attempts to validate the affidavit on the basis that a separate affidavit containing the correct circumstances of the informant was "simultaneously" presented by a different detective but involving a different defendant and residence fails.

When officers violate article I, section 14 of the Utah Constitution by making intentional or reckless false statements to establish probable cause, the proper remedy is the exclusion of the evidence.

A. The intentional or reckless mislabeling of the informant as a "concerned citizen" not only misled the magistrate but denied her the ability to properly evaluate the relevant factors in determining whether probable cause existed.

Case law clearly establishes that the type of informant named in an affidavit bears on their reliability. See State v. Deluna, 2001 UT App 401, ¶14, 40 P.3d 1136 (citation omitted) (recognizing that an "ordinary citizen-informant needs no 'independent proof of reliability or veracity.'"); see also Appellant Opening Brief 20-27. This classification is relied on by magistrates in weighing the totality of the circumstances when determining whether probable cause is established. See State v. Saddler, 2004 UT 105, ¶¶11-25, 104 P.3d 1265 (some of the factors looked at when evaluating the sufficiency of an affidavit based on information given by an informant include corroborating details, statements against penal interest, participation in criminal activity and personal observation). Therefore, by necessity, the magistrate relies on the officer's truthfulness when defining the type of informant relied on to establish the facts and circumstances articulated in the affidavit. See State v. Nielsen, 727 P.2d 188, 190 (Utah 1986) ("[T]he magistrate can only fulfill his constitutional function if the information given to him is true.").

The record is clear that Detective Teerlink believed that if he had identified Mr. Lambson as "just [] an anonymous informant, then it would not be" enough to establish probable cause. R. 221:25. The state contends that Detective Teerlink cannot be considered to have intentionally or recklessly misled the magistrate because descriptions characterizing different types of informants are at best "legal terms of art." Appellee Brief 27. That despite officers long history of using the terms "concerned citizen" "police informant" and "confidential informant" accurately to inform magistrates regarding the level of reliability and veracity of informants, the state charges that suddenly officers "cannot be expected to understand the[] nuances" of the labels used to describe types of informants. Appellee Brief 27. Regardless of the state's general contention, the record in this case supports that Detective Teerlink was acutely aware that the term he used to classify Mr. Lambson would affect probable cause. R. 221:25.

Within the affidavit Detective Teerlink referred to Mr. Lambson three times as a "concerned citizen." R. 79-81. Detective Teerlink testified that he classified Mr. Lambson as a "concerned citizen" because he did not feel that he fit within the guidelines normally used for confidential informants. R. 221:25-26. The state asserts that this supports that the detective did not intentionally or recklessly mislead the magistrate because Mr. Lambson possessed "characteristics found in citizen informants" in that his name was disclosed and no promises of leniency were made to him. Appellee Brief 28. Yet, Detective Teerlink's testimony, with his "experience in writing search warrants," does not indicate that he was unfamiliar with the fact that the type of informant used impacts on a finding of probable cause. R. 221:23. Indeed, not only did Detective

Teerlink acknowledge that had he classified Mr. Lambson as an "anonymous informant" the affidavit would fail to establish probable cause, but testified that he knew that "concerned citizen" informants were accorded more reliability than "criminal informants." R. 221:26.

Under the state's theory, any informant, regardless of circumstance, who provides his name and has been given no express promise of leniency would qualify for the special status of "concerned citizens" where their statements would be presumed reliable. See State v. Brown, 798 P.2d 284, 286 (Utah Ct. App. 1990) (reliability and veracity are not questioned where citizen informers are concerned because "citizen informers, unlike police informers, volunteer information out of concern for the community and not for personal benefit."). Such an outcome not only goes against established case law regarding the status of an informant's impact on the probable cause determination but denies the magistrate the ability to properly evaluate the relevant factors when determining whether probable cause exists. See State v. White, 851 P.2d 1195, 1199 (Utah Ct. App. 1993) ("[T]he veracity or reliability of an informant is still a relevant consideration when reviewing the totality of the circumstances." However, the "'[v]eracity is generally assumed when the information comes from an "average citizen who is in a position to supply information by virtue of having been a crime victim or witness."'" quoting State v. Miller, 740 P.2d 1363, 1366 (Utah Ct. App.) cert denied, 765 P.2d 1277 (1987)).

Despite the detective's misleading classification of the informant, the state contends that "simultaneous" presentation of the affidavit by another detective submitted

to secure a search warrant of a different defendant's residence involving a different case, adequately apprised the magistrate of the true circumstances surrounding the informant's information. See Appellee Brief 15-18. However, even though the detective testified that the affidavits were submitted simultaneously, it is a leap of logic to conclude that the magistrate actually cross-referenced the affidavits without raising any questions about their obvious discrepancies.

The Hardin affidavit, used to secure a search warrant in a different case for a different defendant, described Mr. Lambson as a person "who was detained by Murray Police, concerning a stolen ring." R. 83. Several paragraphs later, the Hardin affidavit describes Lambson as a "concerned citizen" but also states that the detective "has independently verified the information that Mr. Lambson has provided and found it to be true to the best of [his] knowledge" and details, among other things, the surveillance done on the other defendant's residence. R. 84. In contrast, the Teerlink affidavit, used to secure a search warrant in this case, states that he "has received information from a concerned citizen named Gary Lambson" who stated there was stolen jewelry at the Appellant's address. R. 79. The Teerlink affidavit then states that "Mr. Lambson met with [defendant in another case] for the purpose of buying jewelry."

> Daniel v. Keener traveled with Mr. Lambson to 849 North Sir Phillip Drive. Mr. Lambson was told that this was Daniel V. Keener's son's residence. The son is named Daniel Lee Keener. Inside the residence Daniel V. Keener retrieved a bag of jewelry. Mr. Lambson said the bag contained rings, necklaces, watches and bracelets. Mr. Lambson purchased a ring for $50 from Daniel V. Keener. Mr. Lambson said Daniel V. Keener put some of the jewelry in his pocket and left most of the jewelry in the bag at the listed residence. . . .

> . . . Mr. Lambson took the ring he purchased to Mike's Custom Jewelry and Repair at 254 East 6400 South for the purpose of selling it.

R. 79. The affidavit then states that the clerk at the jewelry store recognized the ring as belonging to another employee that was stolen along with other jewelry from the employee's vehicle. R. 79-80. The affidavit states that "the information received from the concerned citizen" is considered "accurate and reliable because: The concerned citizen, Gary Lambson, has provided . . . his name, date of birth and criminal history" and was informed that if he gave "any false information he would be charged with interfering with an investigation." R. 80. Given these vastly different descriptions of the informant, it can only be concluded that the magistrate either did not closely read the names referenced in the affidavits or that she did not cross-reference them. Otherwise, the different status of the informant would have raised questions in the magistrates mind as to which affidavit is accurate. If the magistrate knew that the affidavits referenced the same informant it is counterintuitive to think that it would not have raised questions about whether Mr. Lambson was actually a criminal informant or a concerned citizen. Where there were no questions regarding the discrepancies, it weighs against a finding that the magistrate referenced each of the affidavits in making her determination of probable cause.

Furthermore, as argued in Appellant's Opening Brief, reliance on information outside the four corners of the affidavit to establish probable cause is improper. The state argues that the court necessarily had to rely on information outside of the affidavit once defendant challenged the detective's intentions in mislabeling the informant. See

Appellee Brief 12. However, the state blurs the standards regarding evidence relied on to establish probable cause found within the four corners of an affidavit and evidence introduced to establish whether a detective acted intentionally or recklessly in including or omitting material information. When making a determination of probable cause, the magistrate is "'bound by the contents of the affidavit.'" Deluna, 2001 UT App 401 at ¶9. "An affidavit must provide the magistrate with a substantial basis for determining the existence of probable cause, and [] wholly conclusory statement[s] . . . fail[] to meet this requirement." Illinois v. Gates, 462 U.S. 213, 239 (1983) ("In order to ensure that . . . an abdication of the magistrate's duty does not occur, courts must continue to conscientiously review the sufficiency of affidavits on which warrants are issued.").

On the other hand, when it is alleged that the contents of an affidavit contain intentional or reckless material statements or omit information which was necessary to the finding of probable cause, a Franks evidentiary hearing assists the trial court in determining the truth of such allegation. See Franks v. Delaware, 438 U.S. 154 (1978). If it is shown that indeed the officer intentionally or reckless included or omitted information, that information under federal law is either excised or added to the affidavit. Id. at 171-72; Nielsen, 727 P.2d 188, 191 (Utah 1986). After the information has been excised or included, the court then examines the four corners of the affidavit again to determine whether the information is sufficient to support a determination of probable cause. Id. If not, the information is deemed material and the search warrant must be suppressed. Id.

The state argues that even if probable cause must be established within the four corners of the affidavit, the detective's characterization of the informant as a "concerned citizen" was not misleading when the affidavit is read as a whole. See Appellee Brief 21-23. However, the whole of the affidavit is misleading regarding the informant and his reliability. The first time the magistrate is introduced to the informant in the middle of page two within the four page affidavit, he is described as a "concerned citizen" whom the detective "has received information from" within the last 6 hours. R. 79. The affidavit continues that "Mr. Lambson stated that there is stolen jewelry at [Appellant's address]." R. 79. Mr. Lambson "also stated that the individuals who reside or otherwise occupy [this residence] are engaging in an ongoing narcotics distribution operation." R. 79. There is no mention of Mr. Lambson's detention status. R. 79. The affidavit then gives a brief summary of Mr. Lambson meeting with another individual "for the purpose of buying jewelry" and what Mr. Lambson alleges he saw during his purchase follows. R. 79.

The affidavit then describes "Mr. Lambson [taking] the ring he purchased" to a jewelry store "for the purpose of selling it." R.79. At the time Mr. Lambson was trying to sell the ring he had purchased, the clerk at the jewelry store "recognized the ring as the one that belongs to another employee" which has been "stolen out of her vehicle along with other jewelry." R. 79-80. The affidavit then states that "[t]he police responded to [the jewelry store] and questioned Mr. Lambson." R. 80. Again, there is no mention of Mr. Lambson's detention status at the police station. R. 79-80. According to the affidavit, Mr. Lambson was shown a list by the detective from which he identifies various

pieces of jewelry "he saw in [another defendant's] bag of jewelry at the listed residence." R. 80.

The affidavit then again refers to Mr. Lambson as a "concerned citizen" stating that the information received from him is considered "accurate and reliable." R. 80. Citing the reasons the information is considered accurate and reliable the detective once again refers to Mr. Lambson as a concerned citizen stating "[t]he concerned citizen, Gary Lambson, has provided your affiant with his name, date of birth and criminal history. Your affiant informed Mr. Lambson that if he gave your affiant any false information he would be charged with interfering with an investigation." R. 80. Contrary to the state's assertions, nothing contained in this affidavit relays to the magistrate that this informant is himself actively being detained and questioned for his possible role in a crime. This affidavit does nothing to inform the magistrate that the circumstances in which the information was received were highly conducive to a detained informant being motivated to give information after he had been caught red-handed with stolen jewelry in an attempt to curry favor with police and deflect responsibility or blame.

The detective referred to the informant three times as a "concerned citizen," failed to alert the magistrate to the informant's detention status related to the criminal investigation, failed to corroborate the information received, and failed to state the informant's criminal history all of which materially affected the affidavit. In light of the detective's knowledge that casting the informant as a "concerned citizen" would make him appear more reliable, the detective's actions were intentionally or recklessly misleading. Not only were the detective's actions misleading, they denied the magistrate

the ability to properly evaluate the relevant factors under the totality of the circumstances in determining whether probable cause existed. Thus, as argued in Appellant's Opening Brief, where the detective's misstatements and omissions were intentionally or recklessly false and material and the affidavit otherwise fails to establish probable cause, the evidence should be suppressed. See Appellant's Opening Brief.

B. Suppression of the evidence is a proper remedy under the Utah Constitution where a detective intentionally or recklessly makes false statements to the court to secure a search warrant

The issue of whether the exclusionary rule applies for violations of article I, section 14 of the Utah Constitution has been addressed by the Utah Supreme Court. In State v. Larocco, 794 P.2d 460, 472 (Utah 1990) (plurality opinion), the supreme court "expressly h[eld] that exclusion of illegally obtained evidence is a necessary consequence of police violations of article I, section 14." Id.; see also State v. Thompson, 810 P.2d 415, 419 (Utah 1991) (affirming holding in Larocco).

> This rule properly insures that article I, section 14's prohibition against unreasonable searches and seizures will adequately protect our citizen against illegal police conduct. Anything less would reduce this provision to nothing more than a form of words.

State v. DeBooy, 2000 UT 32, ¶33 n.12, 996 P.2d 546.

As noted in Appellant's Opening Brief, the supreme court in Nielsen, stated "that the federal law as it has developed since Franks v. Delaware is not entirely adequate." Nielsen, 727 P.2d at 192. And "upholding of [a] warrant under federal law" is not determinative "of how the issue [of an immaterial, intentional misstatement in an affidavit] might be resolved under the Utah Constitution." Id. at 192-93. In arguing that

article I, section 14 of the Utah Constitution offers no greater protection than the Fourth amendment, the state attempts to harken back to pre-Tiedemann analysis when interpreting the state constitution. See Appellee Brief 41-47. However, when interpreting Utah's Constitution, the supreme court has been guided by "the traditional methods of constitutional analysis," including "'historical and textual evidence, sister state law, and policy arguments,'" and it is resolved by whichever of these "legitimate sources" the Court finds helpful in deciding the case at hand. State v. Tiedemann, 2007 UT 49, ¶37, 162 P.3d 1106, (citation omitted); see State v. Worwood, 2007 UT 47, ¶18, 164 P.3d 397; State v. Gardner, 947 P.2d 630, 633 (Utah 1997); Society of Separationists, Inc. v. Whitehead, 870 P.2d 916, 921 n.6 (Utah 1993) (citing cases dating back to 1900 where this Court has "encouraged parties briefing state constitutional issues to use historical and textual evidence, sister state law, and policy arguments" (citations omitted)).

As pointed out in Appellant's Opening Brief, historical evidence, sister state law and policy support the argument that the Utah Constitution provides Utah citizens with greater protections against unreasonable searches and seizures. See Appellant Opening Brief 39-47. In addition, policy arguments strongly support quashing a warrant and excluding evidence obtained as a result of false or reckless statements made by an officer in an affidavit. As the supreme court recognized in Nielsen, "[t]here is no stronger argument for developing adequate remedies for violations of the state and federal constitutional prohibitions on unreasonable searches and seizures than the example of a

police officer deliberately lying under oath in order to obtain a search warrant." Nielsen, 727 P.2d at 192-93.

The exclusion of evidence when article I, section 14 has been violated has been deemed a proper remedy by the supreme court. Reckless or false statements included or omitted in order to obtain a search warrant taint the entire warrant. If a magistrate had known that an officer were lying or embellishing the truth in order to establish probable cause, it would affect the magistrate's view of the entire affidavit and violate the article I, section 14 protection. "Were the judicial response to be merely the elimination of the false statements and the assessment of the affidavit's adequacy in the light of the remaining averments, enforcement officers would be placed in the untoward position of having everything to gain and nothing to lose in strengthening an otherwise marginal affidavit by letting their intense dedication to duty blur the distinction between fact and fantasy." United States v. Belculfine, 508 F.2d 58, 63 (1st Cir. 1974).

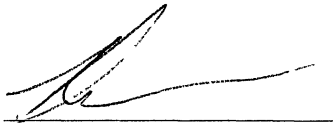
Simply excising false or reckless information whether material or not is an inadequate remedy for this type of police misconduct and necessitates broader protections from Utah's search and seizure clause. Indeed, intentionally or recklessly misstating such a significant fact "exhibits exactly that quality of unscrupled zeal which impelled the adoption of the exclusionary rule." Id. at 62. To "properly insure[] that article I, section 14's prohibition against unreasonable searches and seizures will adequately protect our citizen against illegal police conduct" necessitates interpreting the constitution so as to deny the admissibility of evidence obtained as a result of false or reckless statements made under oath to secure a search warrant. DeBooy, 2000 UT 32, ¶33 n.12. In this

case, where the protection against unreasonable search and seizure found in article I, section 14 was violated, exclusion of the evidence is an appropriate remedy.

CONCLUSION

As more fully set forth in Appellant's Opening Brief, Mr. Keener respectfully requests this Court to reverse the trial court's denial of his motion to suppress, and reverse his conviction.

SUBMITTED this 22nd day of May, 2008.



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CERTIFICATE OF DELIVERY

I, DEBRA M. NELSON, hereby certify that I have caused to be delivered an original and seven copies of the foregoing to the Utah Court of Appeals, 450 South State Street, Salt Lake City, Utah 84114, and four copies to the Utah Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6th Floor, P.O. Box 140854, Salt Lake City, Utah 84114-0854, this 22nd day of May, 2008.

DEBRA M. NELSON

DELIVERED this _____ day of May, 2008.